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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALASKA COMMUNITY ACTION ON TOXICS, *et al.*, Plaintiffs, v. AURORA ENERGY SERVICES, LLC, *et al.*, Defendants.	Case No. 3:09-CV-00255-TMB **PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO THEIR MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

ACAT[1] has conclusively established that Defendants[2] discharge coal and coal materials from the Seward Coal Loading Facility ("SCLF") into Resurrection Bay and other jurisdictional waters outside of stormwater events, and that these discharges have continued after ACAT filed its Complaint in this litigation. Defendants have failed to refute that evidence to create a genuine issue of material fact.

ACAT has also established that Defendants' non-stormwater discharges are not authorized by Defendants' only permit authorization under the Clean Water Act ("CWA" or "the Act"), the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity ("Stormwater Permit" or "MSGP"). The Act's prohibition against unpermitted discharges is straightforward and ironclad. Similarly, the Act's definition of point sources to which that prohibition applies is clear-cut and covers all of the sources identified by ACAT. Defendants' attempts to create exceptions to these requirements out of whole cloth must fail because they are contradicted by the clear language of the statute, regulations, case law, and the express terms of the Stormwater Permit.[3]

Section 301 of the CWA (33 U.S.C. § 1311(a)) makes clear that any discharge of a pollutant that is not authorized by a CWA permit is absolutely prohibited. In this way, the Act imposes a "zero discharge" requirement until a discharger secures authorization under the Act. Defendants have repeatedly admitted that they cannot achieve "zero discharge" for their unpermitted discharges.[4] Accordingly, any recent efforts that Defendants have made to minimize

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[1] Plaintiffs Alaska Community Action on Toxics and the Alaska Chapter of the Sierra Club are collectively referred to as "ACAT."

[2] Aurora Energy Services, LLC ("AES") and Alaska Railroad Corporation ("ARRC") are referred to throughout this brief collectively as Defendants.

[3] *See* Ex. 1 to Plaintiffs' Motion for Summary Judgment ("Pltffs. MSJ") (Doc. 120-1).

[4] *See*, *e.g.*, Defendants' Opposition to Plaintiffs' Motion for Summary Judgment ("Def. Opp.") (Doc. 128) at 15 (acknowledging that Defendants' control measures for discharges from the conveyor are not designed to satisfy a "zero discharge requirement"), 31 (acknowledging the

their discharges, while laudable, do not allow Defendants to escape CWA liability for their continuing discharges.

CWA regulations also make clear that discharges caused by anything other than precipitation are not stormwater discharges.[5] Although a stormwater permit may authorize the discharge of a pollutant when it is carried by stormwater, direct discharge of that same pollutant when it is not mixed with stormwater requires authorization by a separate permit.

The CWA and its case law limit the scope of the "permit shield" to only those discharges within the "reasonable contemplation" of the permitting authority.[6] Because the Stormwater Permit explicitly prohibits authorization for the type of non-stormwater discharges at issue here,[7] those discharges cannot have been within the reasonable contemplation of EPA when it authorized Defendants' stormwater discharges under that permit.

Finally, the CWA and case law interpreting and applying it adopt a broad, function-based test for defining a point source that requires only a showing that the source is "discernible, confined, and discrete." Because the sources at issue in this case satisfy that test, and because the wind-born discharges are clearly traceable to those sources, Defendants are liable for the unpermitted discharges of coal from those sources.

"practical impossibility" of stopping all dust discharges from the facility).

[5] Stormwater is only "storm water runoff, snow melt runoff, and surface runoff and drainage" (40 C.F.R. § 122.26(b)(13)), and stormwater discharges associated with industrial activity are limited to "the discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant" (40 C.F.R. § 122.26(b)(14)).

[6] *Piney Run Pres. Ass'n v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 268 (4th Cir. 2001).

[7] *See* Ex. 1 to Pltffs. MSJ (Doc. 120-1) at 6-8 (MSGP sections 1.1.2, 1.1.3, 1.1.4); Ex. 16 to Pltffs. MSJ (Doc. 120-16) (MSGP Fact Sheet) at 50.

Defendants cannot deny these bedrock principles of the Act. Further, Defendants have not refuted the evidence offered by ACAT that establishes past and ongoing violations of the prohibition against unpermitted discharges. Accordingly, ACAT is entitled to judgment as a matter of law with respect to each of the three claims in its Complaint.

ARGUMENT

I. Plaintiffs Have Satisfied the Prerequisite for Bringing a Citizen Enforcement Suit.

The Act provides only one requirement that a citizen plaintiff must satisfy before it may commence an enforcement action: that the citizen plaintiff provide sixty days' notice "of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order." 33 U.S.C. § 1365(b)(1)(A). There is no question that ACAT satisfied that requirement in this case. *See* Exhibit A to Plaintiffs' Complaint (Doc. 1.1-2). Compliance with the 60-day notice provision satisfies any exhaustion requirement under the Act. *American Canoe Ass'n v. U.S. EPA*, 30 F.Supp.2d 908, 921-22, n.16 (E.D. Va. 1998) (finding that "[g]iven the plaintiffs' compliance with the 60-day notice provision, which gave EPA actual notice of the claims and time in which to act upon them, they have exhausted all administrative procedures required or available under the Clean Water Act").

Defendants have cited to no CWA statutory authority or case law to support their novel argument that citizen plaintiffs are required to object to separate permit coverage, or to petition a regulator to require a discharger to secure permit coverage, before that plaintiff may bring suit under the Act's citizen suit provision to enforce the Act's prohibition against unpermitted discharges. Def. Opp. at 19. Given the clear language of the citizen suit provision, and courts' interpretation of that language (*see* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Pltffs. Opp.") at 27-29), Defendants' references to other sections of the Act or

regulations are not relevant to a determination of whether ACAT satisfied the citizen suit prerequisites.

In addition, that some releases of coal dust from the facility have been regulated as fugitive emissions under the Clean Air Act (Def. Opp. at 23-25) does not preclude the regulation of those releases as discharges under the CWA. Regulation under the CAA does not preclude regulation under the CWA because the CAA and CWA are not mutually exclusive. *See U.S. v. Atl. States Cast Iron Pipe Co.*, 627 F.Supp.2d 180, 379 (D.N.J. 2009) (finding that the CWA and CAA each advances a distinct "societal interest" and that the "nature of the violative conduct under . . . CWA and CAA offenses [does] not represent essentially one composite harm"). Furthermore, the characterization of a release of coal dust as an "emission" under the CAA (Def. Opp. at 13) does not preclude regulation of that release as a "discharge" under the CWA. The labels "emission" and "discharge" are terms of art and the application of one term to a particular release does not affect the applicability of the other term and related statute to that release.

II. Defendants' Non-Stormwater Coal Discharges Are Not Authorized By Any Permit.

A. The Stormwater Permit Expressly Prohibits Authorization for the Types of Non-stormwater Discharges at Issue in this Lawsuit.

The Court's inquiry into whether Defendants' discharges are authorized—explicitly or implicitly—by the Stormwater Permit need extend no further than the plain language of the permit itself.[8] The Stormwater Permit explicitly prohibits all but a small handful of harmless

[8] Defendants argue that (1) informal statements made by the DEC Commissioner (Def. Opp. at 20, n.68) and (2) the EPA's failure to cite Defendants for unpermitted non-stormwater discharges (Def. Opp. at 18) is evidence that the Stormwater Permit authorizes the discharges at issue in this case. However, the language of the Stormwater Permit is the best evidence of what is authorized by the permit. A plain reading of the CWA regulations establishes the general principle that stormwater permits may not be used to authorize non-stormwater discharges, and

non-stormwater discharges, none of which apply here. As a result, Defendants' non-stormwater discharges of coal and coal materials simply cannot be covered under that permit. *See* Pltffs. Opp. at 16-20 (*citing* Ex. 1 to Plttfs. MSJ (Doc. 120-1) at 6-7, 8, 18 (MSGP sections 1.1.2, 1.1.4.1 and 2.1.2.1).

Given the clear language of the Stormwater Permit itself, contrary interpretations from the Alaska Department of Environmental Conservation ("DEC") are not entitled to deference. Defendants' assertion that an informal opinion offered by a Deputy Commissioner of DEC—solely for the purpose of this litigation—represents the "best evidence of the agency's regulatory posture" (Def. Opp. at 20, n. 68, citing to ¶ 11 of the Kent Declaration (Doc. 117)) is unconvincing. EPA spoke clearly on the types of discharges covered by the Stormwater Permit. Interpretation by Defendants or employees of DEC cannot change the clear language of what discharges are authorized by the Stormwater Permit. This Court owes no deference to Deputy Commissioner Kent's two-sentence informal opinion on the issue of whether the Stormwater Permit covers Defendants' non-stormwater discharges. *Greenwood Trust Co. v. Com. of Mass.*, 776 F. Supp. 21, 36 n.38 (D. Mass. 1991) (finding that though "brief, informal staff administrative opinions . . . are entitled to the Court's careful consideration, they should not be given conclusive effect"), *rev'd on other grounds*, 971 F.2d 818 (1st Cir. 1992). Although informal agency statements may be "entitled to respect"—but not deference—when they are

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that any non-stormwater discharges require separate NPDES permit authorization. 40 C.F.R. § 122.26(c)(1)(i)(C) requires that a stormwater permit applicant include a "certification that all outfalls that should contain storm water discharges associated with industrial activity have been tested or evaluated for the presence of non-storm water discharges *which are not covered by a NPDES permit*" (emphasis added). No comma is needed to support the obvious interpretation that this regulation contemplates that a single facility will require two CWA permits: one for its stormwater discharges, and a separate NPDES permit for its non-stormwater discharges. *See* Def. Opp. at 21, n. 70.

based on the "specialized experience and broader information available" to an agency (*Am. Fed'n of Gov't Employees v. Rumsfeld*, 262 F.3d 649, 656 (7th Cir. 2001)), in this case, the exceedingly brief and unsupported opinion presented in the Kent Declaration fails to persuade because it is directly contradicted by the clear language of the Stormwater Permit itself, as well as the language and intent of the CWA. Moreover, unlike the Stormwater Permit, the Kent Declaration was not subject to public notice or comment, nor did it go through any of the procedural requirements required of formal EPA or DEC action.

The clear language on the face of the Stormwater Permit prohibiting coverage for non-stormwater discharges also represents the "best evidence" of EPA's determination as to whether non-stormwater discharges of coal may be authorized under the permit. Additionally, EPA's failure to commence an enforcement action against the Defendants for unpermitted non-stormwater discharges does not change the plain language of the Stormwater Permit. In fact, EPA was never specifically asked to provide an opinion about whether Defendants' non-stormwater discharges may be authorized by the Stormwater Permit. That EPA has not subsequently cited Defendants for their unpermitted non-stormwater discharges of coal (Def. Opp. at 17, n. 51) does not constitute an affirmative determination by the agency that such discharges are not occurring, or that they are authorized under the Stormwater Permit. It is well established that EPA and state regulatory agencies enjoy prosecutorial discretion in choosing whether and how to enforce the Act. *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001) (holding that "the traditional presumption that an agency's refusal to investigate or enforce is within the agency's discretion, unless Congress has indicated otherwise" applies to EPA's

enforcement authority under the Act).[9] As such, the Stormwater Permit prohibits the coal discharges at issue in this case and those discharges have not been sanctioned by EPA's or DEC's lack of enforcement.

B. Whether an NPDES Permit Will Result in Further Discharge Reductions is Not a Factor in Establishing Whether a Party is Liable for Unpermitted Discharges Under the CWA.

Whether an order from this Court directing Defendants to secure an NPDES permit for Defendants' non-stormwater discharges of coal and coal materials will result in additional control measures at the facility or an appreciable improvement in water quality (Def. Opp. at 9, 15, 31) is immaterial to the question of Defendants' liability under the Act.[10] Because Defendants' non-stormwater discharges are not authorized by a permit, Defendants must either completely cease all such discharges, or must secure authorization for those discharges.

It is fundamental to our legal system that the enactment of any regulatory statute creates in the public a duty to comply with the law. This is true even in those instances where an individual's violation of the statute may not result in demonstrable harm. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 307 (1982) (upholding District Court's decision requiring Navy to secure an NPDES permit for its munitions discharges even though the District Court "found that these discharges have not harmed the quality of the water"); *see also*, *Public Interest Research Group v. Yates Indus*., 757 F.Supp. 438, 454 (D.N.J. 1991) (holding that a court may

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[9] Statements made or actions taken by DEC or EPA employees after authorization was granted under the Stormwater Permit are also not relevant to consideration of whether a "permit shield" applies to Defendants' discharges because the only relevant determination in considering whether such a shield applies is what information was within the "reasonable contemplation of the permitting authority" *before* it granted permit authorization. *Piney Run Preservation Assoc. v. Cnty. Comm'rs of Carroll Cnty., Md.*, 268 F.3d 255, 268 (4th Cir. 2001). Events that occurred after the permit authorization was granted are not relevant to that consideration.

[10] Plaintiffs maintain that Defendants' discharges may be causing harm to aquatic life in the receiving waters or otherwise violating water quality standards. That question, however, is not currently before this Court.

find liability under the Act and grant injunctive relief "even where plaintiffs have not established that measurable harm will otherwise result.")

Congress recognized the danger to human health and the environment posed by unregulated discharges of pollutants into navigable waters, and chose to make the unpermitted discharge of a pollutant a strict liability offense under section 301 of the Act. 33 U.S.C. §§ 1311(a) and 1342. "The essence of strict liability is the shifting of accidental loss, as between non-negligent parties, to the one most able to insure against the risk and bear the cost. In the [Clean Water Act], Congress has chosen to shift the cost of damage done to the environment from the public to the owner or operator of the facility from which a harmful discharge emanated." *Ward v. Coleman*, 423 F. Supp. 1352, 1357 (W.D. Okla. 1976) *rev'd*, 598 F.2d 1187 (10th Cir. 1979) *rev'd sub nom. United States v. Ward*, 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

Although Congress chose to apply strict liability to unpermitted discharges, it also provided a reasonable process by which dischargers may secure authorization for their discharges. The Supreme Court has recognized both the absolute prohibition against unpermitted discharges and the reasonableness of the NPDES permit approach, observing that:

> It is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms. An NPDES permit serves to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations (including a timetable for compliance) of the individual discharger. . . . In short, the permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Act].

Envtl. Prot. Agency v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 205 (1976). In fact, "the legislative history makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of §

301(a)." *Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1374 (D.C. Cir. 1977) (emphasis added); *see also*, *Yates Indus.*, 757 F.Supp. at 456 ("This court is not swayed by defendant's argument that it has taken costly measures to correct effluent violations, and that it has achieved dramatic improvement in water discharge quality. However commendable defendant's effort may be, they do not alleviate its duty to satisfy the terms of the [NPDES] permit.").

The only means by which Defendants can come into compliance with the law is by securing an NPDES permit for their unpermitted discharges, or by entirely and permanently eliminating those unpermitted discharges. That some of Defendants' unpermitted non-stormwater discharges may be subject to other forms of regulatory oversight that also impose control measures does not excuse Defendants from the requirement that they secure a CWA permit for those discharges. Similarly, the fact that Defendants have taken some steps to reduce their discharges (though not to completely eliminate them), does not allow Defendants to avoid the absolute requirement that they secure a permit for those discharges. While Defendants' efforts to reduce coal dust emissions from the SCLF are commendable, they do not alleviate Defendants' duty to comply with the CWA and obtain an NPDES permit for continuing non-stormwater discharges.

While every NPDES permit must contain effluent limitations—and those effluent limitations may, in some circumstances, include best management practices (BMPs) (*see* 40 C.F.R. § 122.44(k); *see also* 18 AAC 83.475)—NPDES permits also provide additional important protections. Section 402(a)(2) of the Act directs the permitting authority to set additional permit conditions "to assure compliance with the [Act's] requirements . . . , including conditions on data and information collection, reporting, and such other requirements as he deems appropriate." 33 U.S.C. § 1342(a)(2).[11] These additional permit conditions are

[11] The monitoring requirements in the Stormwater Pollution Prevention Plan

fundamental to the Act because they are the only means by which a regulator may assess the effectiveness of the permit's effluent limitations and ensure that the quality of the receiving water is being sufficiently protected.

Defendants have made clear that discharges from the facility will continue, arguing instead that their discharges are covered under the Stormwater Permit and that the Stormwater Permit "does not impose a zero discharge requirement." Def. Opp. at 15 (emphasis in original). Defendants have recognized, in particular, the "practical impossibility" of stopping all dust discharges at the facility. Def. Opp. at 31. As a result, Defendants must secure an NPDES permit to authorize their currently unpermitted discharges.

III. Defendants Are Liable for their Direct Discharges of Coal from the Conveyor and Shiploader.

Defendants acknowledge that they cannot eliminate all discharges from the conveyor and shiploader. Def. Opp. at 15-21. In the face of this admission, Defendants can only put forth several increasingly far-fetched arguments as to why they are not in violation of the CWA. *Id*.

First, Defendants assert that non-stormwater discharges of coal are authorized under the Stormwater Permit and that ACAT did not properly exhaust its administrative remedies. This argument fails for the reasons discussed above. *See supra* Section I; *see also* Pltffs. Opp. (Doc. 127) at 25-29. Moreover, as discussed at length in ACAT's Opposition Brief, the specific

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("Stormwater Plan") are no substitute for the monitoring that would be required under an individual NPDES permit. The Stormwater Plan only lists three pollutants for which monitoring is required—total iron, total suspended solids, and pH (*see* Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 24 (section 4.1))—and requires monitoring only at stormwater outfalls (*see id*. at 24 (section 4)). The discharges at issue in this litigation do not pass through a stormwater outfall. *See id*. at 11 (table 2) (listing "N/A" as the outfall for discharges from the conveyor and shiploader). Accordingly, existing monitoring cannot assess the impacts of Defendants' unpermitted discharges, or the effectiveness of any control measures.

language in the Stormwater Permit and Stormwater Plan makes clear that those documents only authorize and cover *stormwater* discharges from the conveyor and shiploader. *See* Pltffs. Opp. at 20-22.

Second, Defendants attempt to avoid liability for their discharges of "carryback" from the conveyor by referring to those discharges as stormwater discharges. This argument is similarly unpersuasive. Defendants continually refer to their discharges from the conveyor as "coal sediment" discharges in an obvious attempt to blur the distinction between stormwater discharges containing coal, which are authorized under the Stormwater Permit, and non-stormwater direct discharges of coal, which are not. *See* Def. Opp. at 15, 16, 18-21. ACAT does not deny that Defendants' incidental discharges of coal carried by precipitation-induced stormwater from the facility into Resurrection Bay are covered under its Stormwater Permit.[12] However, when there is no precipitation to generate stormwater, there are no stormwater discharges and therefore there is no authorization under the Stormwater Permit for discharges of coal that fall into Resurrection Bay from the conveyor or shiploader. Further, the addition of water to coal from artificial sources such as the spray bars does not create stormwater, and does not bring non-stormwater discharges within the coverage of the Stormwater Permit.[13] Defendants' strained argument that any discharge containing "water and a pollutant" is automatically transformed into a stormwater discharge is unavailing. *See* Def. Opp. at 20. Such an interpretation would create a loophole in the CWA that would render all non-stormwater provisions of the Act meaningless by allowing dischargers to secure authorization under the stormwater provisions for all of their discharges merely by adding water.

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[12] In particular, ACAT has never claimed that authorized stormwater discharges can never contain pollutants, including coal. *See* Def Opp. at 20.

[13] Defendants' acknowledge that the "coal sediment" is generated both by precipitation and by water from "dust control . . . mixed with coal." *See* Def. Opp. at 12, n. 23.

Third, Defendants argue that liability for discharges of coal that falls from the shiploader, onto a ship, and then into the Bay should attach to the ship and not the SCLF. *See* Def Opp. at 16, n. 45. However, this argument addresses only a small percentage of discharges from the shiploader. Furthermore, the shiploader is surrounded by water. The fact that some coal falls from the shiploader onto the ships and then into the Bay guarantees that additional coal from the shiploader itself, which stretches out over open water to the ship, falls directly into the Bay.

IV. Defendants Are Liable for Their Discharges of Coal Dust From Multiple Point Sources at the SCLF.

A. The Dust Discharges Alleged by ACAT Originate From Discernible, Confined, and Discrete Conveyances Under Defendants' Control that are Point Sources Under the Act.

All of the sources of dust discharges alleged by ACAT fall squarely within the Act's definition of a "point source." Each of these sources is "discernible, confined, and discrete." 33 U.S.C. § 1362(14). By holding that each of these sources is a point source, the Court will not significantly expand the scope of sources that fall within the Act's jurisdiction. Rather, the Court will merely give effect to Congress' intent that water pollution be controlled by individuals and entities whose identifiable actions create those discharges.

In enacting the CWA, Congress focused on the discharger. The Senate Report on the bill that became the CWA noted that "it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, at 77 (1971). By moving the focus upstream to the discharger, Congress made the relevant inquiry not the entry of the pollutant into the water, but rather the action of the discharger that causes the discharge. Accordingly, a discharge under the Act occurs at the point source from which the pollutant is released, even if that point is removed from the navigable water that receives the discharge. *See Sierra Club v. El Paso Gold Mines, Inc.*, 421

F.3d 1133, 1145 (10th Cir. 2005) ("we look to whether the point source is actively adding pollutants to navigable waters. And if the point source is 'discharging,' the 'person' who owns or operates the point source is liable under the Act.").

1. "Channelization" is Only Required for Discharges Involving Stormwater Runoff and Not Applicable to Discharges From Confined Systems.

Defendants would have this Court create a wholly new standard for defining point sources under the Act. Defendants' proposed "channelization" requirement is inappropriate for this case because it relies exclusively on considerations that are relevant to establishing point sources for stormwater runoff. However, such considerations are immaterial to the direct non-stormwater discharges at issue here. *See* Def. Opp. at 22, 25-30. The need for a channelization test in the stormwater runoff context stems from the problem of assigning liability to an individual for precipitation runoff over which he otherwise has no control.

More importantly and directly relevant to the discharges at issue in this case, courts have consistently interpreted the definition of point source broadly to reach all pollution that comes from a confined system. *Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 629-30 (D. R.I 1990) (*citing Sierra Club v. Abston Construction Co., Inc.*, 620 F.2d 41 (5th Cir.1980); *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979)).

As discussed extensively in ACAT's Opposition Brief, the analysis required for a stormwater run-off case is separate and distinct from the inquiry necessary for a case involving a direct non-stormwater discharge of a pollutant.[14] *See* Plttfs. Opp. at 46-50. For discharges not associated with precipitation, the "touchstone for finding a point source is the ability to *identify a*

[14] Assuming *en arguendo* that channelization is required outside of the stormwater context, Defendants' control over the sources of coal dust discharged at the SCLF would satisfy such a requirement. The Defendants control when and how they operate the stacker/reclaimer, railcar unloader, conveyor system, ship loader, stockpiles and bulldozers, all of which create coal dust discharges. Additionally, Defendants control the size and shape of the coal stockpiles, which also results in coal dust discharges. *See* Pltffs. MSJ Brief at 17-18.

discrete facility from which pollutants have escaped." *Washington Wilderness Coalition v. Hecla Min. Co.*, 870 F.Supp. 983, 988 (E.D. Wash., 1994) (emphasis added). In fact, "[t]he concept of point source was developed to distinguish pollution resulting from simple erosion over the surface of the ground from pollution that has been collected *or comes from a confined system*." *Friends of Sakonnet*, 738 F.Supp. at 630 (emphasis added).

The Second Circuit rejected a similar attempt to establish a channelization test for the direct discharge of a pollutant in the absence of rainfall. *See Concerned Area Residents for Environment v. Southview Farm*, 34 F.3d 114, 118-19 (2d Cir. 1994). In *Southview Farm*, defendants argued that their manure spraying operations were "diffuse run-off" and not point source discharges because the liquid "naturally flowed" into streams and because the pollutants were not collected or channeled by human activity. *Id.* The Second Circuit found two distinct classes of point source, holding that "manure spreading vehicles themselves were point sources," and independently holding that on one part of the property "the liquid manure was collected and channelized" by a swale in the field that itself was a point source. *Id.* The court described the manure spreading vehicles as producing a "300-foot-wide swath" (*id.* at 116) of pollutants that "directly flow[ed] into navigable waters." *Id.* at 119. In reaching its determination that the manure-spreading vehicles were point sources, the Court did not find it relevant to evaluate how the manure flowed across the fields between the trucks and navigable waters.

Moreover, simply because pollutants escape from a confined system by natural means does not necessitate a finding of channelization. In *Hecla,* the Eastern District of Washington held that "[d]ischarges from a pond or refuse pile can easily be traced to their source" and as a result "even though runoff may be caused by rainfall or snow melt percolating through a pond or pile, the discharge is from a point source . . ." *Hecla Min. Co.*, 870 F.Supp. at 988. The Tenth Circuit in *Earth Sciences* similarly explained that "the escape of liquid from a confined system is

from a point source" even though that escape was due to "rainfall or snow melt." *Earth Sciences*, 599 F.2d at 374. The Tenth Circuit found that the escape of pollutants from a confined system is "not the kind of general runoff considered to be from nonpoint sources under the [Act]." *Id*.

These cases illustrate that that the relevant inquiry regarding point sources that are not associated with stormwater is to determine whether it is possible to "trace" the pollutant back to a "confined system" from which the pollutant is released or escaped. In this case, there is no doubt that the pollutant, coal dust, can be traced to confined systems at the SCLF. The coal dust escapes from these confined systems (just as in the cases above) and is discharged directly into Resurrection Bay.

2. It is well established that stockpiles are point sources.

Defendants' attempt to distinguish case law that establishes stockpiles as point sources is unavailing. In ACAT's motion, it cites to several cases that found that stockpiles are point sources. *See* Pltffs. MSJ at 33-34. The Defendants argue that these cases found that piles were point sources only when "runoff from the pile was conveyed through some system of ditches, gullies, sumps, or other identifiable pathways to waters of the United States." *See* Def. MSJ Opp. at 27. While each of these cases dealt factually with stormwater runoff from a stockpile, the legal conclusion that the stockpile was a point source, even in the absence of precipitation, was not dependent on collection and channelization. *Abston Constr. Co.*, 620 F.2d at 45-46; *Parker v. Scrap Metal Processors*, Inc., 386 F.3d 993, 1009 (11th Cir. 2004); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1359 (D.N.M. 1995).

Rather, in each of these cases the court simply recognized that a stockpile is a common point source and then determined if the resulting stormwater runoff was a point source discharge. As the Fifth Circuit in *Abston Construction* explained, while gravity flow "may be part of a point source *discharge*" a point source is present with "the mere collection of rock and other materials." 620 F.2d at 45 (emphasis added). In fact, *Abston Construction* explained that there

was no "disagreement the activities would be prohibited if the pollutants had been pumped directly into the waterways." 620 F.2d at 43. This is entirely consistent with *Friends of Santa Fe County* that expressly distinguished overburden piles that "readily constitute[d] point sources" from groundwater seeps that did not. 892 F. Supp. at 1359. The court in *Friends of Santa Fe County* described these overburden piles as "human-originated or -derived point sources of pollutants." *Id*. Additionally, *Scrap Metal Processors*, explained that "[s]torm-water runoff does not, in all circumstances, originate from a point source," but that "piles of industrial debris" were point sources. 386 F.3d at 1009.

Moreover, and as explained above, the Defendants' focus on the unchanneled and uncollected surface waters language from *Consolidated Coal v. Costle* is meaningless in the context of a direct discharge as opposed to a stormwater run-off discharge. *See* Def. MSJ Opp. at 28. The court in *Consolidated Coal* rejected the argument that the regulation of coal refuse and storage piles as point sources "might inappropriately treat *nonpoint* runoff as a point source discharge." *Id*. (emphasis in original); *Consolidated Coal v. Costle*, 604 F.2d 239, 249-50 (4th Cir. 1979), *rev'd on other grounds*, *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64 (1980). The court explained that "the regulations appl[y] only to discharges from point sources." *Id.* at 249-50. Thus, stormwater runoff that is "unchanneled and uncollected" would not be a *discharge* from a point source, but slurry ponds, drainage ponds, and coal refuse piles still meet the definition of point source. *Id*.; *see also*, *Hecla Min. Co.*, 870 F. Supp. at 988 (*citing Consolidated Coal Co.*, 604 F.2d at 240).

3. Defendants' Coal Dust Discharges Fit Squarely Within Precedent Finding Sources of Airborne Discharges to Be Point Sources.

Defendants' attempts to distinguish case law where courts found airborne discharges to constitute violations of the Act also rely on a manufactured standard. As ACAT established in its

discussion of the facts of those cases in prior briefing (Pltffs. Opp. at 51-53), the discharges at issue in those cases were not "forceful, focused, or directed" (Def. Opp. at 29), and the courts' determinations of liability did not hinge on a finding that the discharges were "forceful, focused, or directed." In fact, the words "forceful," "focused," and "directed" do not appear anywhere in any of these three cases. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002); *Peconic Baykeeper, Inc. v. Suffolk Cnty.*, 600 F.3d 180 (2d Cir. 2010); *No Spray Coal. Inc. v. City of N.Y.*, No. 00 Civ. 5395 (GBD), 2005 WL 1354041 (S.D.N.Y. Jun. 8, 2005).

Indeed, how a particular apparatus dispersed the pollutants was not a necessary component of any of those decisions. Rather, those decisions focused on determining the source of the pollutant. For example, in *No Spray Coalition* the court held that "[i]f the helicopters and trucks used by the City conveyed pollutants from their original source to the navigable water, they can most certainly constitute point sources under the CWA." 2005 WL 1354041, at *5. Additionally, in *Peconic Baykeeper*, the Second Circuit explained that the definition of point source encompasses "the broadest possible definition of any identifiable conveyance *from* which pollutants might enter waters of the United States." 600 F.3d at 188-89 (emphasis added). Through the lens of this broad definition, the court held that the spray apparatus "was the source of the discharge," and—as the starting point of the pollutants' direct course into navigable waters—was a point source. *Id*.

4. That Defendants' Coal Dust Discharges Are Carried By the Wind Does Not Change the Fact that the Discharges Originate from Point Sources at the SCLF.

Defendants misconstrue ACAT's claims when they state that "Plaintiffs have not demonstrated that wind itself constitutes a 'discernible, confined and discrete conveyance.'" *See* Def. Opp. at 30. It has never been ACAT's position that the wind itself is the point source. Rather, ACAT argues that Defendants' materials and equipment are the point sources, and that those point sources discharge pollutants are carried by the wind directly to Resurrection Bay.

The CWA does not require that a discharged pollutant immediately enter the receiving water in order for liability to attach to the discharger. The Supreme Court has recognized this important point in *dicta*, noting that "[t]he Act does not forbid the 'addition of any pollutant *directly* to navigable waters from any point source,' but rather the 'addition of any pollutant *to* navigable waters.'" *Rapanos v. United States*, 547 U.S. 715, 743 (2006) (emphases in the original). Accordingly, any discharge that reaches a navigable water, such as Resurrection Bay, imposes a liability on an identifiable discharger to secure authorization for that discharge under the Act.

The Defendants confuse the question of how coal dust eventually reaches Resurrection Bay with the question of what is the source of that pollution. *See* Defs. MSJ Opp. at 29-20. Yet, the "ultimate question is whether pollutants were discharged *from* [a] 'discernible, confined, and discrete conveyance[]. . . ." *Abston Const. Co.*, 620 F.2d at 45 (emphasis added). In answering this question courts look for certain features. For instance, if the pollutant is from an identifiable source it is discernible and thus a point source. *See e.g.*, *Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1173 -1174 (D. Mont. 1995) (citing an EPA letter that explains "any seeps coming from identifiable sources of pollution (i.e., mine workings, land application sites, ponds, pits, etc.) would need to be regulated by discharge permits."); *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1098 (9th Cir. 1998) (discussing the distinction between runoff and a discharge.). Also, "an isolable, identifiable activity that conveys a pollutant" is a point source. *See e.g.*, *Avoyelles Sportsmen's League v. Alexander*, 473 F.Supp. 525, 532 (W.D. La. 1979) (finding that the operation of land-clearing equipment, ditch excavation equipment and discing equipment were point sources).

Significantly for the present case, the Ninth Circuit has adopted the position that the escape of a pollutant from a confined system, even if by natural means, is a discharge from a

discrete conveyance and thus a point source discharge. *See Earth Sciences, Inc.*, 599 F.2d at 374; *Trustees for Alaska v. E.P.A.*, 749 F.2d 549, 558 (9th Cir. 1984) (adopting the *Earth Sciences* analysis). The District of Oregon in *Umatilla Waterquality Protective Association v. Smith Frozen Foods*, held that an unlined brine pond was a "confined and discrete conveyance within the CWA's definition of 'point source,' readily identifiable to a single source." 962 F. Supp. 1312, 1320-21 (D. Or. 1997). The court explained that "the discharger does not need to be actively conveying the pollutants to navigable waters – only that the discharger collected the discharged material prior to discharge." *Id*. The fact that "rain water and gravity that are not under the discharger's control" caused the discharge did not change the brine pond's status as a point source. *Id*.

Similar to the brine pond in *Umatilla Waterquality,* the stockpiles at the SCLF are confined, discrete, and identifiable. Additionally, these piles are collected and created by the Defendants. The mere fact that wind "not under the discharger's control" causes the discharge of coal dust into Resurrection Bay does not change the status of these stockpiles as point sources.

While ACAT has directed the Court to relevant case law, the Defendants attempt to distinguish these cases by urging this Court to engage in an incorrect analysis. This case is not about discharges of coal-contaminated stormwater run-off; rather, Defendants discharge the coal dust at issue "directly into the waterways" from a point source (*Abston Construction*, 620 F.2d at 43), and therefore those unpermitted direct discharges are prohibited under the CWA.

5. A Finding of Liability for Defendants' Coal Dust Discharges Will Not Significantly Expand the CWA's Definition of Point Source.

Contrary to Defendants' assertions, a finding by this court that the identified dust sources are point sources would not "lead to absurd results." *See* Def. Opp. at 25. All of the discharges of coal dust alleged by Plaintiffs are directly traceable to individual sources—including the conveyor systems, railcar unloader, stacker/reclaimer, bulldozers, coal piles, and shiploader. The

traceability of these discharges to those point sources significantly limits the number of sources that would be subject to the Act. The dust discharges at issue in this case are readily distinguishable from a general release of dust to the atmosphere where there is no indication when, where, or whether that dust will reach a navigable water. Similarly, the discharges are distinct from the general atmospheric deposition of dust into a water body that cannot be traced to a single identifiable point source. *See* Def. Opp. at 26-27.

V. Defendants Discharge Coal in Contaminated Snow from the Dock and from Plows.

The direct discharge of coal-laden snow into waters of the United States is a discharge from a point source that requires permit authorization under the Act. *See* Doc. 120-91 at 7 (noting that EPA Region 10 considers snow dumping a point source), at 9 (snow can collect and concentrate pollutants which can accumulate where the snow is dumped), and at 21 (noting that "[d]ebris collected with snow would count as 'residue'"); *see also*, Doc. 120-92 at 2 (EPA Region 1 Draft Snow Dumping Policy, stating that "[d]isposal of snow and associated road salt, sand, oil, and grease into waters of the United States is regulated under the Clean Water Act and requires a permit"). Defendants attempt to confuse the issue by repeatedly referring to "snow melt runoff." *See*, *e.g.*, Def. Opp. at 33. The discharges alleged by ACAT, however, are direct discharges of coal that is mixed with snow that is discharged directly into jurisdictional waters prior to snow melt.

Defendants' direct discharges of contaminated snow are not authorized under the Stormwater Permit because, as discussed above and in ACAT's previous briefing, the only discharges authorized under the Stormwater Permit from the conveyor and dock are discharges of stormwater from the conveyor. *See* Pltffs. Opp. at 20-24. Neither the Stormwater Permit nor the Stormwater Plan discusses or authorizes any coal discharges from the dock. Furthermore, to

the extent that the Stormwater Plan addresses snow or snow removal, it specifies that the snow is to be managed "so that contaminated snowmelt drains to the sediment control structures rather than directly to outfalls." Ex. 4 to Pltffs. MSJ (Doc. 120-4) at 21 (section 3.5.4). Accordingly, the Stormwater Permit and Stormwater Plan do not authorize the direct discharge of coal mixed with snow into Resurrection Bay.

Defendants' discharges of coal mixed with snow from the dock are reasonably likely to continue. *See Gwaltney of Smithfield Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987). Coal and coal dust regularly accumulate on the SCLF's dock. Pltffs. Opp. at 58. Defendants operate the SCLF during the winter and, indeed, the winter tends to be the busiest season. Ex. 26 to Pltffs. MSJ (Doc. 120-20) at 3 (DEC facility inspection report). When there is snow on the dock, and the facility is operating, this coal and coal dust will accumulate on the snow. It defies common sense that coal and coal dust that have been observed in significant accumulations on the dock would not be deposited on the snow-covered dock during Defendants' busiest season.[15]

Defendants have not shown that they have taken any action to prevent coal contaminated snow from falling from the dock into Resurrection Bay. Defendant ARRC's facility manager Paul Farnsworth has personally observed snow fall through the dock and into Resurrection Bay.[16] *See* Ex. 90 to Pl's MSJ, Deposition of Paul Farnsworth ("Farnsworth Depo.") (Doc. 125-

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[15] It also defies common sense that the SCLF's dock would not be covered in snow for significant portions of the winter season.

[16] Defendants do not dispute that Farnsworth has observed snow fall "through the dock." *See* Def. Opp. at 37, n. 151. Defendants' claims that snow on the dock may be contaminated by other materials but not by coal is nonsensical given (1) the ubiquity of coal at the facility (exporting 1,000,000 tons of coal in 2011 (*see* Pltffs. MSJ at 17)) and (2) Defendants' well-established inability to control spillage from the conveyor and shiploader (*see* Ex. 26 to Pltffs. MSJ (Doc. 120-26) at 4, 10-11 (inspection report documenting coal on dock); Ex. 19 to Pltffs. MSJ (Doc. 120-19) (2009 report documenting 25 tons or more of coal on dock after every ship); Stoltz Depo., Ex. 11 at 136:10-20 (noting anywhere from 500 to 1,000 pounds of coal on dock after shiploading)), as well as Defendants' inability to control coal dust, including dust at the

3) at 113:3-114:6. Defendants have not shown that they have taken any action to seal the gaps in the dock or otherwise prevent contaminated snow falling through those gaps from reaching Resurrection Bay. Accordingly, the next time Defendants operate the facility when there is snow on the dock, Defendants will discharge coal-contaminated snow into Resurrection Bay.

VI. ACAT Has Proven Violations on Specific Days, and Has Established the Reasonable Likelihood that these Violations Will Continue.

ACAT has provided undisputed evidence of violations on specific days and has shown that there is a reasonable likelihood that these violations will continue. *See* Pltffs. MSJ at 42-43 (days of unpermitted discharges of coal spillage from conveyor), at 44-51 (days of unpermitted discharges of coal dust from facility point sources). On August 8, 2009, Mr. Maddox, Mr. Higman and Ms. McKittrick personally observed, photographed and videotaped carryback coal fall into Resurrection Bay from the BC 14 conveyor. *See* Maddox Decl. (Doc. 106) at ¶¶ 21 and 23 and Maddox Decl. Ex. 15 at 1-7 (Doc. 106-28) and 59-62 (Doc. 106-32); Higman Decl. (Doc. 109) at ¶¶ 3-4; McKittrick Decl. (Doc. 105) at ¶ 3; Higman Decl. Ex. 1 and 3[17] (Doc. 109-1 and 109-2) (videos documenting coal falling from conveyor onto Tyvek tarp sheet under conveyor, onto beach in intertidal zone and directly into Resurrection Bay during the loading of a vessel). On this date, Defendants unlawfully discharged coal into Resurrection Bay. ACAT's MSJ brief identifies multiple additional days of unpermitted discharge of carryback into Resurrection Bay.

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shiploader (*see* Pltffs. MSJ (Doc. 120) at 43-44 (noting days when dust went "off site" from ship loader and days when ship loader was shut down due to inability to control dust). In addition, Defendants admit that there is no zero discharge requirement (*see supra* at 10 and 24) and that coal dust is created at the SCLF and goes off site (*see* Pltffs. MSJ at 43-51).

[17] These video exhibits have been filed conventionally with the Court. *See* Order Granting Motion to File Exhibits Conventionally (Doc. 135).

In ACAT's MSJ brief, ACAT identified multiple days when coal dust was discharged into Resurrection Bay. *See* Pltffs. MSJ at 44-51. One example of days of violations relies upon Defendants' own observation reports. Defendants report when coal dust goes off site. *See id*. at 44-45 (citing Ex. 61 (Doc. 120-67). For example on December 20-23 and 27-28, Defendants acknowledged that coal dust was going "off site" at the ship loader.[18] *See id.* Given the fact that the shiploader is surrounded by water, if coal dust goes off site from the shiploader, it must, under the rules of physics, enter Resurrection Bay. To further support this point, ACAT has provided photographic evidence of coal dust going "off site" during ship loading. *See* Maddox Decl. Ex. 21 (Doc. 106-39) at 1-5 and Ex. 4 (Doc. 106-5) at 1-11.

ACAT has also shown that these intermittent violations are reasonably likely to occur in the future because Defendants have not succeeded in installing control measures capable of entirely eliminating their discharges. *See Sierra Club v. Union Oil Co. of Cali.*, 853 F.2d 667, 670 (9th Cir. 1988) (*quotation omitted)* (any remedial action taken must show violation has been "completely eradicated."); *Adams v. Teck Cominco Alaska, Inc.*, 414 F.Supp.2d 925, 937 (D. Ak. 2006) (same); *Save Our Bays and Beaches v. City and County of Honolulu*, 904 F. Supp. 1098, 1118 (D. Hawai'i 1994) (defendant must completely eradicate the risk of future violations); *see Community Ass'n for Restoration of the Environment v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002) (for ongoing violation, plaintiff must show either (1) violations on or after the date complaint is filed, or (2) evidence that shows a continuing likelihood of a recurrence ion intermittent or sporadic violations).

First, Defendants acknowledge carryback falls from the conveyor system into Resurrection Bay and that Defendants installed drips pans after this suit was filed in an attempt

[18] During this period, Defendants shut down numerous times due to their inability to control coal dust. *See* Pltffs. MSJ at 48. Further, Mr. Maddox submitted a complaint to DEC during this period, identifying several days when coal dust was not being contained and was going "off site" including into Resurrection Bay. *Id.* at 48-49.

to minimize those discharges. *See e.g.*, Stoltz Depo., Ex. 11 (Doc. 125-1) at 114:7-25, 115:1-2, 115:13-25, 116:1-25 and 117:1-22. Yet, Defendants acknowledge that they have not completely eradicated the unpermitted coal spillage discharges from the conveyors and shiploader at issue in this case. *See* Pltff. MSJ at 40 (citing Brown Deposition, where AES Manager Brown acknowledges that while drip pans were installed to catch carryback, he cannot claim that the pans have completely eliminated all carryback from falling into the Bay); *see also id.* at 41 (*citing* Stoltz Depo., where AES Foreman Stoltz acknowledges that carryback falls into the Bay, that the drip pans were installed to catch the carryback and that the drip pans do not cover the entire conveyor belt system above Resurrection Bay, thus admitting that the drip pans have not completely eradicated carryback discharge into Resurrection Bay); *see also* Stoltz Depo. Ex. 11 (Doc. 125-1) at 132:23-25) (acknowledging that coal continues to spill onto dock and into bay) and 136:7-20 (acknowledging that shiploader continues to spill coal onto dock during loading).

Second, Defendants and their experts acknowledge that they have not "completely eradicated" coal dust discharges into Resurrection Bay. Defendants, in their own summary judgment motion, assert that there is no zero discharge requirement for the facility. *See* Pltffs. Opp. at 43 citing Def. MSJ at 14, 36 n.153, 50-55. In addition, Defendants' expert report, introduced in support of their summary judgment motion, states that coal dust "will continue to settle into Resurrection Bay." *See* Pltffs. Opp. at 43 *citing* Winges Declaration (Doc.119-1) at 5. Third, Defendants' consultants also have found that coal dust settles in the Bay. Ex. 9 to Pltffs. MSJ (Doc. 120-9) at 7 ("coal dust particles migrate south and deposit … in the nearby harbor."); Ex. 94 (Doc. 120-99)[19] ("coal dust continues to show up in the marina ….). Finally, ACAT has

[19] Note that Plaintiffs' MSJ erroneously cited to this document (Ex. 94) as Ex. 22. *See* Pltffs. MSJ at 23, 27, and 43 (citing to Ex. 22 rather than properly citing Ex. 94 at 1).

provided extensive evidence of the ongoing discharge of coal dust into Resurrection Bay. *See* Pltffs. MSJ at 43-51; Pltffs. Opp. at 40, 42-44. Additionally, since filing the Complaint, Mr. Maddox has documented coal dust covering snow that was then covered by the tide in Resurrection Bay. *See* Pltffs. MSJ at 50-51, *citing* Maddox Decl. and exhibits.

CONCLUSION

ACAT has shown that Defendants are discharging coal from point sources at the SCLF into Resurrection Bay. These discharges occur completely independently of any stormwater discharge. Defendants have no permit for these non-stormwater discharges of coal into Resurrection Bay. Consequently, Defendants are unlawfully discharging coal into waters of the United States without a permit. For these reasons, as well as those identified above and in ACAT's MSJ and Opposition Briefs, ACAT requests that this Court grant ACAT's motion for summary judgment and deny Defendants' motion for summary judgment.

DATED: July 2, 2012

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CERTIFICATE OF SERVICE

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